



Michigan Appellate Bench Bar Conference Foundation

Michigan Appellate Bench Bar Conference

Appellate Advocacy in the 21st Century – Bench and Bar Working Together to Achieve Justice Under Law

Schedule

A cooperative effort of the
Michigan Supreme Court, the Michigan Court of Appeals, the
Michigan Appellate Bench Bar Conference Foundation, and the
State Bar of Michigan Appellate Practice Section,
with substantial financial support from
the DeWitt C. Holbrook Memorial Fund.



April 24–26, 2013

The Inn at St. John's
44045 Five Mile Road, Plymouth, Michigan

Michigan Appellate Bench Bar Conference
Appellate Advocacy in the 21st Century – Bench and Bar Working Together to
Achieve Justice Under Law
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The Inn at St. John's
Schedule of Events

Wednesday, April 24, 2013

5:30–7:00 p.m. **Registration and Reception — *Garden Gallery/Lobby–First Floor***
An opportunity to socialize with justices, judges, court staff, and fellow practitioners.

Thursday, April 25, 2013

7:30 a.m. **Registration — *Lobby–First Floor***

7:30–8:30 a.m. **Continental Breakfast — *Garden Gallery–First Floor***

8:30–8:45 a.m. **Welcome — *Grande Ballroom–First Floor***

Chief Justice Robert P. Young

Chief Judge William B. Murphy

Foundation Co - Chair Mary Massaron Ross

8:45–10:30 a.m. ***Plenary—Michigan Appellate Advocacy: A View from the Bench and the Bar — Grande Ballroom–First Floor***

In this plenary session, a panel of appellate justices, judges, and practitioners will share their likes and dislikes and discuss the results of a survey of both the bench and bar on appellate advocacy preferences for briefing and oral argument.

Panel: Chief Justice Robert Young, Michigan Supreme Court, Justice Bridget McCormack, Chief Judge William Murphy, Michigan Court of Appeals, Judge Jane Beckering, Michigan Court of Appeals, and Valerie Newman, Assistant Defender, State Appellate Defenders Office. Megan Cavanagh will present the results of the judicial survey. Mary Massaron Ross, Plunkett Cooney, will moderate.

8:00 a.m.–5:45 p.m. **Internet Café — *Abraham Suite Hallway–2nd Floor***

Visit the Internet Cafe throughout the conference to see efilings demonstrations from Tyler Technologies, Inc. and ImageSoft, Inc. Tyler's Odyssey File & Serve, is the current efilings system utilized by the Michigan Court of Appeals. ImageSoft's TrueFiling platform has been selected by the SCAO as the statewide electronic filing system for centralizing and standardizing electronic filings in courts throughout Michigan. Representatives of both Tyler and ImageSoft will be on hand to answer questions, to show you the many benefits of these systems, and to help you navigate the sometimes confusing waters of efilings.

10:30–10:45 a.m. **Refreshment Break — Conference Foyer, 2nd Floor; Wisdom, Lower Level; Nazareth, First Floor; Executive Boardroom, First Floor**

10:45–12:00 p.m. **Advocacy Breakout Sessions — See List**

Advocacy 1 — Executive Board Room–First Floor

Advocacy 2 — Nazareth–First Floor

Advocacy 3 — Ruth–2nd Floor

Advocacy 4 — Sarah–2nd Floor

Advocacy 5 — Esther–2nd Floor

Advocacy 6 — Kings II–Lower Level

Advocacy 7 — Judith–2nd Floor

Advocacy 8 — Samuels–Lower Level

Advocacy 9 — Kings I–Lower Level

Advocacy 10 — Wisdom–Lower Level

These breakout sessions will explore the best approach to writing effective briefs and presenting persuasive oral argument in the Court of Appeals and Supreme Court. The sessions will be led by experienced appellate advocates and will allow practitioners, as well as judges, justices, and court staff, to discuss practical ideas for improving written and oral advocacy.

12:05–2:00 p.m. **Dewitt C. Holbrook Memorial Fund Luncheon — Atrium–Lower Level**

Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World - Robert Dubose; Alexander Dubose & Townsend LLP, Houston, Texas

Recently lawyers, clients, and even many judges have begun to read more on screens than on paper. Mounting evidence suggests that screen reading is changing the way we read and process information. We will discuss (1) ways in which reading is changing; (2) strategies for reading in this new environment; and (3) tools to make appellate briefs clearer and more persuasive to screen readers.

2:15–3:30 p.m. **Law Practice Breakout Sessions**

The breakouts will be participatory — not traditional lectures from a panel of speakers. This is what makes the bench bar conference unique. All who attend the breakouts will be encouraged to participate in the discussion.

Criminal

Ineffective Assistance of Counsel at Plea Stage, Lafler v Cooper, and Making a Record — Nazareth–First Floor

More than 90% of criminal cases are resolved by plea. This session addresses practical considerations for judges, prosecutors, and defense attorneys about what should occur at the plea stage. What information should be placed on the record? How can defense attorneys ensure that they have provided all the necessary information to their clients? How can prosecutors ensure that the record is complete so that the conviction will be sustained? What are the obligations of the trial court? How does *Lafler v Cooper* change the landscape for this process? These questions and others will be discussed.

Sentencing Issues, Miller v Alabama, and Juveniles — Executive Board Room—First Floor

Sentencing issues are always thorny, and they generate a significant number of appellate questions. This session will address at least two different kinds of sentencing issues. The perennial issue of how to score the OV's and the current issues surrounding them will be discussed. The session will also address the recent decision of *Miller v Alabama*, and what it means for the sentencing of juvenile offenders who are convicted of first-degree murder. Should there be other changes for sentencing those offenders who commit their crimes while under the age of 18?

SADO Appellate Project, Evidentiary Records for Ineffective Assistance of Counsel Claims, and Evidentiary Hearings — Sarah—2nd Floor

The State Appellate Defender Office has launched a pilot program for certain appellate cases to provide for an expanded opportunity for establishing an evidentiary record on claims related to the ineffective assistance of counsel. This session will discuss this pilot program, as well as the significant issue about how to address the evidentiary record for claims of ineffective assistance of counsel more generally. When should the Court of Appeals remand for an evidentiary hearing? How should the defense handle an evidentiary claim when remand has been denied? Are there circumstances in which prosecutors should agree to an evidentiary hearing to support their position that there was no ineffective assistance? Should deadlines in all cases be extended to permit greater access to the trial court?

Practical Considerations for Habeas Cases — Ruth—2nd Floor

All you wanted to know about habeas but were afraid to ask. This session will address all aspects of habeas corpus petitions, both legal and practical. What are the primary issues on which the federal courts are granting habeas relief? What are the implications of these decisions for the state courts? Should the Michigan courts do anything differently? Should the fact that there may be a claim raised in federal court change the way that either the defense bar or prosecutors respond to claims for relief on appeal, or in claims raised in MCR 6.500? This and more will be discussed.

Civil

Civil Appeals 101 — Judith—2nd Floor

For the newer attorney or occasional appellate practitioner, handling an appeal may be a nerve-racking experience. This session - which covers important deadlines, key rules of appellate practice and procedure, insiders' tips, and common pitfalls to avoid when handling appeals - will ease your fears and help you avoid mistakes. Hear from court staff about the Court of Appeals' e-filing system and how the clerk's office operates. Listen to tips from distinguished appellate judges on best practices for both briefing and oral advocacy, and take in the experiences of seasoned appellate practitioners in a collaborative environment where the collective goal is to provide the best appellate representation for your clients.

Innovations for the Appellate Lawyer — Esther–2nd Floor

Court staff members and judges will discuss tools for improving appellate advocacy; increasing on-line access to the appellate courts' dockets; allowing public access to pending applications; making briefs available to the public before the calendar stage; providing access to docketing statements; assessing the level of access in other state courts; court blogs and Twitter accounts; and searchability of unpublished opinions.

Appellate Rules and Procedure: The Latest, the Next and the Needed — Samuels–Lower Level

Participants in this session will discuss recent court rule changes, including the entirely new subchapter on appeals to circuit court and experiences or problems with the shortened time for delayed leave applications. We will look at the current crop of proposed changes from the Michigan Supreme Court and discuss whether they should be adopted or modified. Participants also will be welcome to suggest ideas for changes not yet proposed.

The Art of Seeking Reconsideration — Kings II–Lower Level

The rules provide for reconsideration and rehearing but when and how to go about it can be more art than science. When is the client best served by this added effort? What arguments will spark the Court's interest? Does the analysis depend upon whether the practitioner seeks reconsideration of an order versus rehearing of an opinion? What differentiates reconsideration in the Court of Appeals from the Supreme Court? How does the process work internally and how frequently (or not) is reconsideration/rehearing granted? Appellate court staff and judges will be available to provide insight into these interesting and sometimes baffling questions.

Family

What is the Record on Appeal in Domestic Relations Cases? — Kings I–Lower Level

What transcripts must be ordered? What happens when the trial court takes judicial notice of parts of another case file? What about referee transcripts? What happens when the Court of Appeals calls up another case file? What about attempted expansion of the record on appeal? We will be discussing all these issues, related due process and notice concerns, and, of course, all the practical implications.

Child Welfare

Session One: Termination-of-Parental-Rights Cases from Interlocutory Application to Remand — Wisdom–Lower Level

Before parental rights are terminated, orders may be entered that are best reviewed or only reviewable sooner rather than later. This session will cover the process of appealing orders of removal from parental custody after preliminary hearings, initial disposition orders on temporary wardships, orders based on in re CR, and decisions by DHS regarding placements, Title IV-B benefits, and consents to adopt. Remands, reversals, and reconsideration, and what relief to request will help participants with strategies useful in both appellate and trial courts before and after the termination of parental rights.

3:30–3:45 p.m.

Refreshment Break — Conference Foyer, 2nd Floor; Wisdom, Lower Level; Nazareth, First Floor; Executive Boardroom, First Floor

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Family

Attorney Fees in Domestic Relations Cases — Kings I–Lower Level

What are the bases for attorney fees? What court - trial or appellate - has jurisdiction over an award based on need? What court can determine if an appeal was vexatious and, if so, the amount of the award? What attorney fees awards are dischargeable in bankruptcy after the 2005 bankruptcy amendment, and what is a Domestic Support Obligation under the amended bankruptcy code? What standards apply to determining the reasonableness of attorney fees in domestic relations cases – are *Smith v Khouri* and *Augustine* applicable? We will be discussing the above as well as attorney fee appeals by right in relation to post-judgment appeals.

Child Welfare

Session Two: Appellate Issues Regarding Reasonable Efforts and Active Efforts Under the Indian Child Welfare Act — Wisdom–Lower Level

Post-*In re Rood*, trial and appellate attorneys can no longer view “reasonable efforts” as a mere funding consideration under Title IV-E. After *In re Morris*, “active efforts” and notice pursuant to the Indian Child Welfare Act (ICWA) are concepts that trial and appellate attorneys in child welfare must preserve. Use of DHSs policy and procedure manuals as to what constitutes proper reasonable or active efforts will be featured, along with a review of case law after *Rood* and *Morris*.

4:45–5:45 p.m. ***Plenary — Where the Brief Meets the Brain: Appellate Practice in the Digital Era — Grande Ballroom–First Floor***

As courts move more to electronic filing, judges and practitioners rethink the basics of appellate practice - reading and writing on-screen. Panel of judges, court staff and top-tech lawyers in a show-and-tell plenary session for everyone who wants to write a better e-brief, or to read one.

Panel: Robert Dubose, Scott Bassett, Stuart G. Friedman, Judge Kristen Frank Kelly, Michigan Court of Appeals, and Kathy Donovan, Court of Appeals Staff. Barbara H. Goldman will moderate.

6:00 p.m. ***Reception and Dinner — Atrium–Lower Level***

The Appellate Practice Section’s Lifetime Achievement Award will be presented to former Chief Clerk of the Michigan Court of Appeals Sandra Schultz Mengel.

Sandra Schultz Mengel was a member of the Michigan Court of Appeals staff for 32 years, from her law school graduation in 1979 until her retirement in 2011. During her career, she served in each of the principal divisions of the Court, as a research attorney, a judicial law clerk, a research division supervising attorney, and in various positions in the Clerk’s Office. At her retirement, Ms. Mengel had served as Chief Clerk for ten years. During that period, she also served on the court’s committees for internal operating procedures, court rules, personnel, technology, summary disposition fast track, delay reduction, and long-range planning, as well as SCAO committees or work groups on technology issues, record production, and ADA policy, and the State Bar of Michigan’s Judicial Crossroads Task Force committee on technology.

History of Recipients

1998	Justice Charles Levin
2001	Justice Patricia Boyle
2004	Judge Harold Hood
2007	Judge James Ryan
2010	Kathleen McCree Lewis
2012	Justice Marilyn Kelly
2013	Sandra Schultz Mengel

Dinner tables will be hosted by members of the bench.

7:30 a.m. **Registration — Lobby–First Floor**

7:30–8:30 a.m. **Continental Breakfast — Garden Gallery/Lobby–First Floor**

8:30–9:30 a.m. **Plenary — Whose Appeal Is It? “I once had this case...” — Grande Ballroom–First Floor**

In this plenary, be it the client, the attorney, amicus, or the judge, everyone involved in the life of an appeal likely claims ownership over the case. In this plenary session, a panel consisting of appellate judges and practitioners will discuss who has control over an appeal with respect to issues raised and decided, how the answer to that question may change over the course of the appeal, and what this may mean for the appellate process.

Panel: Justice Brian Zahra, Michigan Supreme Court, Justice Bridget McCormack, Judge Kurtis Wilder, Michigan Court of Appeals, Mary Massaron Ross, Plunkett Cooney. Megan Cavanagh, Garan Lucow, will moderate.

8:30–12:00 noon **Internet Café — Abraham Suite Hallway–2nd Floor**

Visit the Internet Cafe throughout the conference to see efilings demonstrations from Tyler Technologies, Inc. and ImageSoft, Inc. Tyler’s Odyssey File & Serve, is the current efilings system utilized by the Michigan Court of Appeals. ImageSoft’s TrueFiling platform has been selected by the SCAO as the statewide electronic filing system for centralizing and standardizing electronic filings in courts throughout Michigan. Representatives of both Tyler and ImageSoft will be on hand to answer questions, to show you the many benefits of these systems, and to help you navigate the sometimes confusing waters of efilings.

9:45–10:45 a.m. **Whose Appeal Is It? Breakout Sessions — See List**

Whose Appeal 1 — Executive Board Room–First Floor

Whose Appeal 2 — Nazareth–First Floor

Whose Appeal 3 — Ruth–2nd Floor

Whose Appeal 4 — Sarah–2nd Floor

Whose Appeal 5 — Esther–2nd Floor

Whose Appeal 6 — Kings II–Lower Level

Whose Appeal 7 — Judith–2nd Floor

Whose Appeal 8 — Samuels–Lower Level

Whose Appeal 9 — Kings I–Lower Level

Whose Appeal 10 — Wisdom–Lower Level

These breakout sessions will provide an opportunity for members of the bench and bar to further explore issues raised in the plenary session.

10:45–11:00 a.m. **Break — Grande Ballroom/ Garden Gallery–First Floor**

11:00–12:00 p.m. **Plenary — Tips from the Justices on Effective Supreme Court Advocacy — *Grande Ballroom–First Floor***

How can I convince the Supreme Court to take my case? What is the best way to use the first few minutes of my argument? What kind of authority is most persuasive? How can I respond to hypothetical questions? Join us as our distinguished panel addresses these questions and more. Since advocacy in a court of last resort differs in important ways from advocacy in an intermediate appellate court, this plenary presentation will help you hone your advocacy skills for briefing and argument in a court of last resort.

Panel:

Chief Justice Robert P. Young, Jr.
Justice Michael F. Cavanagh
Justice Stephen J. Markman

Justice Mary Beth Kelly
Justice Brian K. Zahra
Justice Bridget Mary McCormack
Justice David F. Viviano

12:00–2:00 p.m. **Dewitt C. Holbrook Memorial Fund Luncheon — *Atrium–Lower Level***

Presentation Skills For Appellate Lawyers - Lisa DeCaro and Leonard Matheo; Courtroom Performance, Inc., Evergreen, Colorado

This dynamic seminar takes you beyond the usual “public speaking” classes to help you discover how to be the most credible, most persuasive person in the room. Whether you’ve argued dozens of appeals or are preparing for your first, you’ll learn new skills which will help you compose and deliver a compelling oral argument. An appellate argument comes with unique challenges – you’ll pick up some great tips for capitalizing on those challenges, and you’ll leave with clear techniques you can use immediately. Using movie clips and live demonstrations to illustrate the techniques discussed, this seminar provides lawyers with practical skills that enhance every aspect of their presentation.

Additional Information

Name Badges

Justices, judges, and court staff can be identified by a peach-colored name badge.

Tent Cards

Please use your name tent card at the sessions. This will allow all in the room to easily identify you when you participate in the open discussion.

Continental Breakfast — *Garden Gallery–Lobby/First Floor*

Breaks - Located strategically throughout the building in the second floor lobby and lower level.

Table Assignments - Reception/Dinner with the Bench - 6:00 p.m.

Dinner tables will be hosted by members of the bench. Your personal itinerary will indicate your assigned table. Table assignments are made in advance of the program. Thank you for sitting at your assigned table.

Survey Following Event

Following the Conference, please watch your email for two separate mailings:

- An electronic survey to record your thoughts and comments about the conference, for use in planning the next conference.
- A summary report of the 2013 conference sessions, in which you can read reports from sessions that you were unable to attend.